Before the Federal Communications Commission Washington, DC 20554

In the Matter of	
Connect America Fund) WC Docket No. 10-90

COMMENTS OF THE AMERICAN CABLE ASSOCIATION ON PUBLIC NOTICE DA 13-284 SEEKING FURTHER COMMENT ON ISSUES REGARDING SERVICE OBLIGATIONS FOR CONNECT AMERICA PHASE II AND DETERMINING WHO IS AN UNSUBSIDIZED COMPETITOR

The American Cable Association ("ACA") respectfully submits comments in response to the Wireline Competition Bureau's Public Notice seeking comment on the following Connect America Fund ("CAF") Phase II issues: how to "determine which census blocks are served by an unsubsidized competitor;" "how price cap carriers will demonstrate they are meeting the Commission's requirements for reasonable comparability;" and, what other providers "need to demonstrate to be deemed unsubsidized competitors."

I. INTRODUCTION AND SUMMARY

ACA's comments herein build on its recent filings and comments to the Commission, which, among other things, discussed use of the National Broadband Map ("NBM") to determine unserved areas and the establishment of a challenge process to NBM designations.² In brief, ACA has –

• Supported the Commission's proposal in the Public Notice DA 12-2075

See Wireline Competition Bureau Seeks Further Comment on Issues Regarding Service Obligations for Connect America Phase II and Determining Who is an Unsubsidized Competitor, WC Docket No. 10-90, Public Notice, DA 13-284 (Feb. 26, 2013) ("Public Notice").

See, e.g., Reply Comments of the American Cable Association on Procedures Relating to Areas Eligible for Funding and Election to Make a Statewide Commitment in Phase II of the Connect America Fund, WC Docket No. 10-90 (Mar. 4, 2013).

("December Public Notice") to use 3 Mbps/768 kbps as a proxy on the NBM for 4/1 Mbps in developing the initial list of eligible areas, and to require a party challenging the designation to present probative evidence demonstrating whether this proxy speed is being provided.

- Agreed with the Commission that the preliminary list of eligible census blocks would only include those that are completely unserved according to the NBM and challenges would only be permitted on the census block level (and not on a subcensus block level).
- Proposed that the Commission (1) presume that cable operators meeting the speed benchmark also meet the latency, capacity, and price metrics, and (2) require any challenge to designations for cable operators based on factors other than broadband speed as shown on the NBM to be based on clear and convincing evidence.
- Proposed that the Commission refine its proposed challenge process and evaluation by –
 - 1. Presuming the NBM is accurate and placing the initial burden on those challenging NBM designations.
 - 2. Requiring a price cap LEC at the time a challenge is filed to inform (via certified mail) providers designated as serving the "challenged" census block on the NBM.
 - 3. Having the Commission determine whether the price cap LEC's evidence for each census block is sufficient to make a prima facie case that the specific designation may be incorrect prior to seeking a rebuttal from the provider designated on the NBM.³
 - 4. Having the Commission publish a list of all census blocks that are potentially unserved because sufficient evidence was provided by the price cap LEC and asking for responses from the provider designated on the NBM.
 - 5. Giving the provider designated on the NBM at least 40 days to respond.

In evaluating whether a price cap LEC has submitted evidence to make a prima facie case

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offers of service from the competitive provider that covers the relevant service area, including review of the provider's website. Finally, the Commission should consider adopting measures to discourage the filing of speculative challenges.

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that a specific census block is unserved, the Commission should at least require that the LEC provide documentation (as certified by an officer of the company) that it has made good faith inquiries to a competitive provider about whether it can provide service in that census block. The LEC also should provide any response to these inquiries by the competitive provider. In addition, the Commission should require the LEC to provide documentation that it has made good faith inquiries about any advertisements and other

6. In assessing evidence about whether a provider should be considered to be serving an area, requiring the Commission to include deployments that are actually in progress and where the provider has publicly announced that service will be available within a reasonable period.

In these comments, ACA elaborates on these positions in responding to the inquiries and proposals raised in the Public Notice. Most importantly, ACA submits that the Commission has more than sufficient evidence to recognize that broadband service offered by cable operators that meets the speed requirements for Phase II support also satisfies the latency, capacity, and price requirements. ACA further cautions against adopting proposals that would threaten existing investments in broadband plat of unsubsidized providers in high cost areas or discourage deployment of high-performance broadband infrastructure by entities using only private capital.

II. DETERMINING UNSERVED AREAS – BROADBAND SPEEDS

The Commission seeks to "further develop the record on what speed threshold in the June 2012 State Broadband Initiative ("SBI") data should be utilized as a proxy for 4 Mbps/1 Mbps" and specifically inquires as to whether 6 Mbps/1.5 Mbps should be used.⁴ In prior comments, ACA submitted that 3 Mbps/768 kbps should be used as the proxy for 4/1 Mbps, a position consistent with the Bureau's proposal in the December Public Notice. ACA's position is based on numerous factors, including that use of 6/1.5 Mbps as proxy would result in either placing an onerous burden on cable operators or risk expending scarce government support in areas where 4/1 Mbps service is actually provided.

To begin with, cable networks employ DOCSIS technology, which does not have the same restrictions on speeds as DSL networks operated by incumbent price cap local exchange carriers ("LECs"). Accordingly, if a cable provider is shown on the NBM as offering a 3

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Public Notice, ¶ 9.

Mbps/768 kbps broadband service, it is likely actually offering a 4/1 Mbps service.⁵ ACA has seen no evidence to counter this conclusion and continues to urge the Commission to adhere to its prior proposal.

Moreover, it would be inequitable for the Commission to amend the proxy yet continue to base the determination of served or unserved on June 2012 data collected by SBI.⁶ Cable operators assumed when they filed data with the SBIs that being classified as providing service with speeds of at least 3 Mbps/768 kbps service was enough to protect them from being overbuilt.

In addition, changing the proxy now would impose a substantial burden on a smaller cable operator to ensure that in the areas where it is providing 4/1 Mbps service (but not 6/1.5 Mbps service on the NBM), it is not overbuilt. Should the Commission use 6/1.5 Mbps as the proxy, a cable operator offering 4/1 Mbps service (but less than 6/1.5 Mbps) that appropriately deemed these areas as 3 Mbps/768 kbps would need to provide to the Commission probative evidence that it is in fact offering 4/1 Mbps service – and would need do so on a census block basis. The Commission should understand that many smaller ACA members do not have census block information for their service territory, and the SBIs were willing to accept address data in lieu of census block data. To require a smaller operator to now update data in the NBM through a challenge process in which it must provide probative evidence that it offers 4/1 Mbps service in

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Moreover, while the Commission is proposing to base its determination of a "served" area on June 2012 data, the Commission should be confident in assuming that cable operators in general will be offering higher speeds by the time that price cap LECs make their statewide commitment and even more certainly by the time these LECs actually start deploying service using CAF funding.

If the Commission is to base the determination of served or unserved on June 2012 data collected by SBI, then it should ensure this data is easy to access by the public – and by challengers who will need sufficient time to review it. This is especially the case where data on government websites may have been updated with more recent data from December 2012 or later and the older data is difficult to locate.

census blocks without the assistance of the SBIs would be a significant burden. Further, ACA submits that the burden on potentially hundreds of smaller cable operators providing 4/1 Mbps broadband far outweighs the burden that would fall upon the small number of price cap LECs if the current proxy remained and they were required to challenge a cable operator that it is not providing broadband at speeds of 4/1 Mbps. Therefore, at least as a matter of equity, the Commission should to use 3 Mbps/768 kbps as the proxy or as the proxy for cable operators. At most, the Commission could place the burden on the price cap LEC and permit it to challenge a cable operator, claiming that while it is designated on the NBM as providing a service of 3 Mbps/768 kbps, it is not actually providing 4/1 Mbps service.

Should the Commission reverse course and use 6/1.5 Mbps as the proxy, ACA estimates that it would put at risk areas where cable operators have already spent their private capital to provide broadband service of at least 3 Mbps/768 kbps but less than 6/1.5 Mbps. Using the Commission's most recent *Internet Access Services* report, there are approximately 2.8 million subscribers to cable modem service at downstream speeds of more than 3 Mbps but less than 6 Mbps.⁸ Assuming cable modem service accounts for 60 percent of wireline service subscribers and all wireline broadband service is taken by 70 percent of housing units, there would be an additional approximately 6 million housing units in "unserved" areas because of the change in the proxy to 6/1.5 Mbps – all of which may be overbuilt.

ACA recognizes that Phase II support may not go to all these "above 3 Mbps/768 kbps but below 6/1.5 Mbps" areas because they might not have 4/1 Mbps service, may be below the

The Commission too has recognized the burden of providing granular broadband data as part of its proceeding to Modernize Form 477 and has proposed creating an application that is intended to ease the burden of submitting broadband deployment data on a census block level. See Ex Parte of the American Cable Association, WC Docket Nos. 11-10,

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^{07-38, 08-190-} and 10-132 (Mar. 18, 2013). See Internet Access Services: Status as of December 31, 2011, Industry Analysis and Technology Division, Wireline Competition Bureau, at 31 (Feb. 2013).

cost threshold for CAF funding or because a cable operator has filed a successful challenge that it offers 4/1 Mbps service. However, the provision of support in these additional areas still has the potential to result in significant government-supported overbuilding, which would cause real harm to cable operators serving these customers using only private capital. Further, cable operators that provide broadband at 3 Mbps/768 kbps but less than 4/1 Mbps can be expected to easily upgrade their service offering and can readily do so because each year demand for higher speed service is increasing. ACA urges the Commission to proceed cautiously. Use of a higher proxy would also mean that locations across the country with the slowest speeds will not receive broadband because the program has no additional funding.

Finally, the Bureau next inquires about whether, if it uses 6/1.5 Mbps to determine unserved areas, price cap LECs should be required to provide Phase II supported broadband at 6/1.5 Mbps to all locations.¹⁰ As a matter of equity, the answer is absolutely yes. However, ACA urges the Commission not to alter the baseline 4/1 Mbps benchmark it has established for the Phase II program.

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Expanding eligible areas to those with broadband service with speeds of less than 6/1.5 Mbps would increase the pool of available subsidy areas included in the cost model estimates. With fixed subsidy resources (\$1.8 billion), the likely result is that some locations with broadband service at speeds of less than 4/1 Mbps that would have previously received funding would now be displaced by some locations that with speeds greater than 4/1 Mbps but less than 6/1.5 Mbps. If the Commission seeks to bring higher speed broadband service to these areas, increasing the speed benchmark for recipients of support will work against that objective. It also is likely to result in having more locations continuing to have only broadband service with speeds of less than 4/1 Mbps after CAF II is complete than by using 3 Mbps/768 kbps. Alternatively, if the Commission uses 3 Mbps/768 kbps as the proxy, while some locations between 3 Mbps/768 kbps and 4/1 Mbps would not be funded, all of the \$1.8 billion would be focused on locations with truly lower speeds (3 Mbps/768 kbps).

See Public Notice, ¶ 9.

III. DETERMINING UNSERVED AREAS – OTHER REQUIREMENTS

The Bureau proposes to establish a rebuttable presumption that if a cable operator meets the speed threshold such that an area on the NBM is designated as served, the operator also meets the capacity, latency, and price requirements. As indicated above, ACA supports this proposal. Moreover, the Commission should require a challenger to submit clear and convincing evidence to prove the competing provider is not actually meeting the requirements. 12

The Bureau should recognize that by permitting inquiries into these additional requirements, it opens every census block on the NBM to a challenge, since the SBIs never sought this information from broadband providers. This would impose a great burden on cable operators that have already submitted mapping data and on the Commission that would need to hear and decide every challenge on potentially multiple factors. Thus, the Commission, in

not most) customers find useful.

In reviewing evidence submitted by price cap LECs challenging a NBM designation, while the Commission should begin by presuming the NBM is accurate, it should consider the latest information on deployments and the provision of service. This includes accepting that a competitive provider is present in an area with broadband service of at least 4/1 Mbps if the provider submits certified documentation that a build is actually in progress and the provider has publicly announced that service will be available by a date certain or within a reasonable period.

In sequencing its work on the Phase II cost model with the list of eligible areas, ACA submits that the Commission should first complete work on the map of eligible areas, including completion of the challenge process for all areas. With funding for Phase II limited, by following this sequence, the Commission can ensure that the cost model leaves enough money to build to all 50 states if all the money were accepted.

See Public Notice, ¶ 11, n. 19. ACA notes at the outset that any inquiry into capacity or usage allowances cannot merely assess the "list" usage allowance for the 4/1 Mbps tier. Cable operators that have usage allowances often impose a "soft" limit, permitting subscribers to regularly exceed this limit by a limited degree with no penalty. In addition, cable operators regularly work with customers that exceed the usage allowance by a large percentage, suggesting they will have a better experience if they subscribe to a higher speed tier, which is something that, in the experience of ACA members, many (if

The "clear and convincing" standard would place a significant burden on the challenger to produce hard evidence, that is, actual data that the public interest requirements are not met by a cable operator. This evidence should include at least an economic assessment of actual effective (not list) prices.

addition to presuming cable modem service satisfies the additional requirements, should discourage challenges that are not supported by clear and convincing evidence.

Moreover, the Commission already has sufficient proof, including from data gathered regularly for the Commission's *Measuring Broadband America Report*, ¹³ that broadband service of cable operators satisfies these other technical requirements. ¹⁴ It is well-recognized that the DOCSIS platform enables cable operators to easily and readily enhance broadband performance in response to customer demands and competitive pressures.

More specifically, ACA submits that the Commission is justified in presuming that cable operators offer comparable price and data usage in these areas – as well in applying a clear and convincing standard for all challenges on these requirements by price cap LECs. The fact is that in almost every rural community in which they offer broadband service, ACA members compete with and react to the prices and terms of service of other broadband providers, including the price cap LECs, wireless and satellite providers. Many of these competing providers operate regionally or nationally and establish rates and terms accordingly. In effect, this drives prices for ACA members operating even in a single rural area to those found in more urban areas. Further, many ACA members themselves operate cable systems in numerous areas (both urban and rural) within a state or in multiple states, and they too tend to establish uniform prices and usage requirements for urban and rural areas in which they offer service. ACA notes that, as evidence of the value of cable modem service – especially in terms of price/performance attributes – as

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See, e.g., 2013 Measuring Broadband America, February Report, FCC's Office of Engineering and Technology and Consumer and Governmental Affairs Bureau ("cable-based services delivered 99 percent of advertised [download] speeds" (at 9); "cable-based services delivered 108 percent [of upload speeds]" (at 10); "cable-based services average 26 ms [round-trip latency]" (at 11)). In the Public Notice, the FCC states, "[t]he June 2012 testing results show that the average peak period round trip UDP latency for all wireline terrestrial technologies is less than 60 ms." Public Notice, ¶ 25.

Measuring Broadband America Report, Chart 20.

seen by consumers, last year cable operators "took over 90% of new broadband subscribers," and in 2013 this amount may grow. ¹⁵ For all of these reasons, the Commission's proposed presumption – that a cable operator that meets the speed requirement also meets the other factors – is soundly based, and any challenge should require the price cap LEC to produce clear and convincing evidence to the contrary.

In addition, ACA believes there are cogent reasons for the Commission to refrain from acting ambitiously to adopt benchmarks for price and terms of service, especially ones that would effectively establish (either directly or effectively) prices and minimum usage allowances that competitive providers must follow if an area is to be deemed "served." First and foremost, the Commission should recognize that any attempt to establish even hard and fast comparable rates and terms of service could prove harmful to existing private investments in broadband plant of unsubsidized providers in high cost areas, and likely deter future private investment in these areas. ACA is most concerned that the Commission not establish a price benchmark to determine whether a cable operator is "serving" an area on that basis. Put simply, cable operators deploying in rural areas need to receive a comparable return on investment as operators in urban areas, and any Commission action that would establish prices below that "market" price would lower that return. That would certainly run counter to the Commission's objective of expanding broadband throughout the country.

In addition, as a matter of determining the price and terms of broadband service, the Commission should recognize that the prices and terms for this service provided by cable operators are often in flux and cannot be assessed just by examining the list or advertised unbundled price. ACA members regularly change prices and any usage allowances, especially in

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See UBS Investment Research report, "Video Subs Stayed (barely) Positive in '12," at 4 (Feb. 29, 2013).

reaction to competitive forces and subscriber demands. This often occurs in conjunction with changes in speed tiers. In other words, an operator may increase the speeds in a tier, keep prices constant, and increase usage allowances (assuming any exist). Moreover, most subscribers take broadband service bundled with voice and video service and may even take it as part of promotional offering, making it difficult to accurately determine the price. Finally, the most subscribed-to service – which ACA submits is the most relevant to judge comparability – may not be the 4/1 Mbps equivalent speed tier but a much higher one. This is especially the case as subscribers access more video content. All of this means that the effective price and terms upon which to determine comparability may not be readily apparent and even if they are at some point, they fluctuate frequently. Once again, rather than establish a price benchmark to determine whether a cable operator is "serving" an area on that basis, the Commission should assume areas served by cable operators offer prices at rates that satisfy the threshold for being deemed served, and resolve challenges on these grounds on a case-by-case basis where the challenger has to present clear and convincing evidence that the price offered by the cable operator in a census block, based on the pricing model of the operator, is not reasonably comparable to urban rates.

There are also legal requirements that should inhibit aggressive Commission action.

First, the standard in the statute for purposes of ensuring universal service is "reasonable comparability" – not absolutely reasonable, which is a term often associated with common carrier ratemaking. ¹⁶ In addition, retail broadband service offered by cable operators is not rate

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See 47 U.S.C. § 254. In the *Connect America Fund Order*, the Commission recognized this fact, deciding that both pricing and usage allowance should be based not upon some absolute standard but rather upon comparability to what is offered in urban areas. *See Connect America Fund*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶¶ 98, 113 (2011) ("*CAF Order*"). Again, as set forth in ACA's proposed challenge process, a price cap LEC is not without recourse to address the price issue. It can come forward and produce clear and convincing evidence that a cable operator's price is somehow not reasonably comparable. As set forth herein, this case-by-case analysis is both justified and more administrable.

regulated (which includes regulations applicable to terms of service). 17 As such, any action by the Commission that seems to establish rates and terms of service for broadband service offered by cable operators would be subject to almost certain challenge for being legally infirm.

Respectfully submitted,

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¹⁷ See Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Services, 545 US 967 (2005). This too was recognized by the Commission in the CAF Order. See CAF Order, ¶ 113.